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No. 97-1798

In the

Supreme Court of the United States

October Term, 1997

Birbrower, Montalbano, Condon & Frank, P.C., and Kevin F. Hobbs,

Petitioners

v.

ESQ Business Services, Inc.,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of California

---

MOTION AND BRIEF *AMICUS CURIAE* OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION IN SUPPORT OF PETITIONER

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MOTION OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Federal Communications Bar Association ("FCBA") respectfully moves under Rule 37(2) (b) of this Court for leave to file the attached brief *amicus curiae* in the above captioned case. In support of this motion, the FCBA states as follows:

1. It is an association of more than 3,000 members, most of whom are attorneys engaged in the practice of communications law. The association is headquartered in Washington, D.C., the situs of the Federal Communications Commission. The mem-

bership of the association is highly concentrated in the District of Columbia, though it has members also in 44 states and 15 foreign countries. Clients of the members of the FCBA are located in every state and in many foreign countries.

2. The nature of the FCBA's interest in this case is to obtain clarification of the extent to which a state, consistent with the Commerce Clause of the United States Constitution, may discriminate against out-of-state lawyers by restricting their ability to move in interstate commerce while representing their clients. Members of the FCBA, by reason of their specialized knowledge and experience representing clients in the multi-faceted communications industry, serve individuals and businesses that are typically located outside the local jurisdictions in which the lawyers have their offices and are admitted to practice. For further discussion of the extent to which the decision in this case impacts communications attorneys and their clients, see the section of the attached brief entitled "Interest of the FCBA as *Amicus Curiae*."

3. The FCBA has addressed requests for consent to the filing of this brief to counsel for both petitioners and the respondent. Consent has been received from counsel for the petitioner. Counsel for the respondent has withheld consent.

4. Rule 37(1) states that an *amicus curiae* brief that brings to the attention of the Court "relevant matter not already brought to its attention" may be of "considerable help" to the Court. This brief meets that test in the following ways:

a. It brings to the attention of the Court the experience and perspective of a specialty bar with a national rather than a local client base.

b. It discusses the interpretation by the California Supreme Court of that state's unauthorized practice statute in the

context of traditional analysis by this Court of restrictions on state statutes by the Commerce Clause of the United States Constitution.

c. It brings to the attention of the Court a vote of the full American Law Institute on May 12, 1998, one week after the petition for certiorari was filed, rejecting the approach in this case of the California Supreme Court, citing its decision, and characterizing the decision as "unduly restrictive."

d. It emphasizes the importance of the Court's taking this case notwithstanding the failure of the California Court to address in its opinion the crucial federal constitutional question, and discusses the law applicable to certiorari review in those circumstances.

For the reasons stated, the Federal Communications Bar Association respectfully asks this Court to grant it leave to file the brief amicus curiae that is submitted with this motion.

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BRIEF *AMICUS CURIAE* OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION

PRELIMINARY STATEMENT

The Federal Communications Bar Association ("FCBA") submits this brief as *amicus curiae,* pursuant to Rule 37(2) of the Rules of this Court, to urge a grant of certiorari.[1]

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1 This brief is filed accompanied by a motion for leave to file, as required by Rule 37(2)(b). No counsel for any party authored this brief in whole or in part. No person or entity other than the FCBA and its members has made a monetary contribution to the preparation or submission of this brief. None of the parties to this case or their counsel are members of the FCBA.

INTEREST OF THE FCBA AS *AMICUS CURIAE*

The more than 3,000 members of the FCBA are located in 44 states and 15 foreign countries. The membership is principally concentrated in and about the District of Columbia, the seat of the Federal Communications Commission ("FCC").

Clients of Communications Attorneys

FCBA member attorneys represent clients throughout the nation who are active in the following business endeavors, most of which are regulated by the FCC:

- Radio and television stations, both commercial and non-commercial.
- Cable television systems.
- Telephone companies, including facilities-based long distance carriers, local exchange carriers, international carriers, and resellers of telecommunications services.
- Wireless telecommunications companies, such as those providing cellular and PCS service, paging service, and special mobile radio service.
- Internet service providers and content providers.
- Domestic and international satellite companies, including teleport operators, satellite system operators, and earth station licensees.
- Manufacturers of equipment for all the foregoing services.

Substantially all of the operations of these clients involve some type of interstate commerce. While these clients are spread over all 50 states, as well as foreign nations, substantial numbers in all categories are in California. All the major satellite manufacturers are located in California.

FCBA member attorneys also represent numerous entities that do business with entities in the telecommunications industry, such as radio and television program syndicators, municipalities awarding or considering renewal or revision of cable television franchises, or franchises to private competitive telecommunications services, real estate owners and developers negotiating arrangements to provide communications services to their tenants or residents, purchasers of long distance and local exchange capacity and satellite capacity, and police departments and other public safety organizations that communicate by radio.

FCBA attorneys represent investors in, and lenders to, telecommunications entities. They also represent consumer groups and citizen watchdog groups that monitor and report on the performance of broadcasters and others in the telecommunications industry.

Interstate Aspects of Communications Law Practice

Because many telecommunications entities do business in a number of states, and because of the expertise that communications attorneys acquire as to the industry in general and the business and operations of their clients in particular, communications attorneys are frequently called upon by their clients to travel to states other than those in which they regularly practice and are admitted to the bar. They also communicate regularly by telephone, facsimile, computer, and other technological means with their clients, and others on behalf of their clients, in states other than those in which they maintain their offices.

Many communications attorneys have no clients at all in the jurisdictions in which they are admitted to practice. This is particularly true of communications attorneys who are located in the geographically small area of the District of Columbia.

Types of Services to Clients

Communications attorneys are often called upon by their clients to provide advice on matters that involve mixed questions of state and federal law. They are expected by their clients to provide comprehensive service in an economical and efficient manner. In order to do so, they must be able to exercise their professional judgment as to whether questions of state law are so unusual or difficult as to warrant recommending that their clients obtain additional advice from a lawyer who regularly practices in the state the law of which applies.

A large part of the work of communications lawyers involves the purchase and sale by their clients of telecommunications properties, most of which transactions require the approval of the FCC prior to consummation. Communications lawyers are often called upon to negotiate, advise on and draft the agreements of purchase and sale, which do not vary significantly from state to state. They are, however, unique as compared to contracts for the sale of businesses not subject to FCC regulation. In the case of mergers and acquisitions, and the sales or transfers of control of holding companies owning many operational entities, the laws of numerous states as well as federal law may be relevant.

Often communications lawyers are called upon to negotiate, draft and advise on contracts that are ancillary to the contracts of purchase and sale, such as contracts between buyers and investors for capital formation, loan documents from banks and venture capital firms, including security documents, time brokerage agreements which are increasingly utilized in broadcast sale transactions, and management and operating agree-

ments in the cellular and other wireless fields. Almost all of these contracts must meet FCC requirements, and all are governed as well by the law of some state. They are usually contracts with which communications counsel have had a great deal of experience, in numerous states, and with which local counsel in the states have had little experience.

Communications attorneys are also called upon by their clients to be their principal spokespersons and advisors regarding, and the principal drafters of, the numerous documents ordinarily required to close a telecommunications transaction after FCC consent has been obtained. The communications attorney's experience in similar transactions is usually the principal factor in selection by the client for that task. The client will look to the communications attorney for recommendations as to when the advice of local counsel in the state or states involved will need to be sought, as where the sale of real estate is involved or local zoning authority must be obtained. The closings are often held where the client and not the attorney is located.

Other Contract Work for Clients

Aside from such transactional work, communications attorneys are often involved in representing their clients with respect to contracts such as the following with which local counsel in the state of the client's state of residence or principal business activity probably have little experience:

- Cable carriage contracts between television stations and cable systems in their service areas.

- Cable service franchise agreements.

- Interconnection agreements between long distance and local carriers and other entities that participate at various stages in the transmission of voice or data from one user to another user elsewhere in the world.

- Cellular service and pager service contracts, which are often standardized for numerous users in various states.

- Leases by satellite systems of their capacity, which are likewise often standardized for use in various states.

- Coordination contracts between different satellite systems.

- Broadcast program syndication, network service, newswire service, and other program supply contracts.

- Royalty contracts between broadcast stations and organizations such as ASCAP, the American Society of Composers, Artists and Publishers, which represent the holders of copyrights on broadcast material.

In the course of performing this work for their clients, it is often necessary for communications attorneys to travel to the states in which the clients are located, to meet with officers of the clients and outside advisors such as accountants, to confer with representatives of the other party with which the client has entered into or is contemplating a contractual relationship, to discuss strategy with the client, and to give advice. At other times, communications attorneys obtain information and provide advice by telephone or by other interstate electronic means, which may include advice as to state law since every contract must be interpreted and enforced under the law of some state.

Other Work for Clients

Communications attorneys may be called upon to consult with and advise their clients on other matters that have state law aspects. The client may be considering a claim by or against it for breach of contract, or for copyright or service mark infringement, or for unfair competition. The client may call upon the communications attorney to present to investors or lenders the current federal and state regulatory climate per-

taining to the particular business of the client, or the means by which an investment in or loan to the client may be secured, consistent with federal and state law. In order to meet the client's needs, the communications attorney may be called upon to travel to the state in which the client is located or to give advice using interstate means of communications.

Communications attorneys, because of their experience before local public service commissions throughout the country, are often called upon by their clients to appear before commissions in states other than those in which they are admitted to practice. They do so with the implicit or explicit consent of those state commissions, which have included the California Public Utilities Commission.[2]

The above list of areas in which communications lawyers are called upon regularly to serve clients who are located beyond the territorial boundaries of the jurisdictions of their offices and bar admissions is by no means exhaustive. But it illustrates the kinds of situations in which members of the FCBA may now regularly find themselves thwarted in their duty to meet the needs of their clients by uncertainty as to the law of unauthorized practice in view of the *Birbrower* decision.

SUMMARY OF ARGUMENT

The decision of the California Supreme Court in this case clouds the law as to the interstate practice and has caused widespread alarm among attorneys and the clients who depend on their services. It raises serious questions of constitutionality

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2. Whether the California PUC continues to have the power to permit such practice after *Birbrower* is uncertain. The opinion refers to a judicially-created, "narrowly drawn and strictly interpreted" exception to the unauthorized practice statute for appearances before a "state court or tribunal." Appx. p. 12.

application of the Commerce Clause to state restraints on interstate economic activity. The decision has been criticized by the American Law Institute in a recent Restatement as unduly restrictive. The constitutionality under the Commerce Clause of the decision's interpretation of the California unauthorized practice statute should be decided by this Court, or the decision should be reversed and remanded to the California court for its consideration of the Commerce Clause.

REASONS FOR GRANTING THE WRIT

I. *Birbrower* Unsettles the Law and Impedes the Ability of Lawyers with Interstate Practices To Serve Their Clients

Hitherto most communications attorneys have thought that they are not engaged in the unauthorized practice of law as long as they do not practice from an office in a state in which they are not admitted and do not enter an appearance in a state court or other tribunal unless they submit themselves to its disciplinary authority *pro hac vice*. They have not thought that there was any bar to their serving clients in other states who sought their services in a particular matter, including traveling when necessary in interstate commerce and using interstate means of communication.

They have also not believed it necessary to be admitted to the bar of another state in order to research, read, interpret and advise on the law of that state as required to serve their clients on a matter involving interstate commerce. Those clients are not likely to think that their attorney in a distant location, who serves communications clients in many states, has been admitted to the bar of the state where the client is located. Communications lawyers have considered it part of their responsibility to their clients to recognize when the advice of local counsel on state law is necessary and in those instances to recommend that such advice be sought.

The *Birbrower* decision suggests a different interpretation of unauthorized practice, applicable now in only one state, albeit one of the major commercial states of this nation. But unless the constitutional limitation is clarified, California's novel interpretation is subject to adoption by other states which may be encouraged by it to apply that interpretation to out-of-state lawyers.[3] Such a result would seriously impede the rendering of legal services across interstate borders.

The California court seems to say that the sort of services that lawyers routinely perform for their clients are against the law if performed in California by an out-of-state lawyer for a California client, or even if performed from the lawyer's own office in another state if it involves advice on California law.

While the *Birbrower* decision seemingly limits its prohibition to instances in which the services rendered are "substantial" or the lawyer has a "continuing relationship" with the client, neither term is defined. If it is a regular client of the lawyer, the relationship would presumably be deemed "continuing." Most services rendered by communications attorneys to their out-of-state clients would presumably be considered "substantial." Even a matter that an attorney reasonably deemed to be insubstantial at the outset could easily escalate into a substantial matter. At that point, the attorney's resignation from representation would likely impose the greatest hardship on the client and impede a satisfactory resolution of the matter.

Communications attorneys are doubtless not alone in their astonishment at California's application of its unauthorized practice statute. Professor Wolfram of Cornell Law School, in

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3. Avoiding "economic Balkanization" and the "retaliatory acts of other States that may follow" has been recognized by this Court as one of the central purposes of its Commerce Clause jurisprudence. Camps Newfound/Owatonna v. Harrison, --- U.S. ---, 117 S. Ct. 1590, 1599 (1997).

his 1995 article cited on pp. 20 and 24 of the Petition for Certiorari, stated that the California unauthorized practice statute ...

> "... is susceptible of many readings, only one of which would apply it to any legal work in California by an out-of-state lawyer. Under that restrictive interpretation, the statute is probably violated by thousands of out-of-state lawyers daily."[4]

A major malpractice insurer has indicated in a recent bulletin to its members that its "Hotlines on Birbrower, Montalbano, Condon & Frank have caused more member comment than any other Hotline to date."[5] The American Bar Association has featured the case in an article entitled "Lawyer Go Home" in its May 1998 *Journal*.

The problem is not necessarily remedied by lawyers staying home, even if that result were tolerable under the Commerce Clause of the Federal Constitution[6]. The California Court said that it is possible to practice law in that state in violation of its unauthorized practice statute "by telephone, fax, computer, or other modern technological means."[7]

The problem is also not necessarily remedied by associating with a local lawyer in every instance, even when the out-of-state attorney deems the expense of doing so unwarranted for the

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4. Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. Texas L. Rev. 665, 713 n.157.

5. *ALAS Loss Prevention Hotline Bulletin*, via Internet, Wednesday, May 20, 1998.

6. United States Constitution, Article I, Section 8, Clause 3.

7. Appx. to Petition, page 10.

client. The court said in *obiter dictum* that "no statutory exception ... allows out-of-state attorneys to practice law in California so long as they associate local counsel in good standing with the State Bar."[8]

II. The California Court's Interpretation of Unauthorized Practice Impermissibly Burdens Interstate Commerce.

It is virtually undeniable that California's interpretation of its unauthorized practice statute will constitute a deterrent to out-of-state lawyers entering that state to serve their California clients or using interstate means of communication to give needed legal advice to such clients. The California Supreme Court has made attorneys engaging in such activities subject to prosecution for a violation of its criminal law, as well as to denial of compensation for their services.

In this modern day when the commercial interests of businesses frequently extend across state lines, often to all fifty states and foreign countries, when businesses seek the lawyers wherever located who have the expertise to help them, and when lawyers with such expertise typically have clients in many states, this Court should consider whether the burden placed on interstate commerce by California's restrictive interpretation of its unauthorized practice statute can be sustained as constitutional.

Traditional analysis by this Court of the constitutionality of state statutes under the Commerce Clause calls for an initial determination of whether the statute "facially discriminates against interstate commerce."[9] Discrimination "simply means differential treatment of in-state and out-of-state economic in-

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8. *Id.* at page 6 n.3.

9. Fulton Corporation v. Faulkner, 516 U.S. ---, 116 S. Ct. 848, 855 (1996).

terests that benefits the former and burdens the latter."[10] This Court should grant certiorari for the purpose of determining whether forbidding out-of-state lawyers from meeting the legal needs of their California clients while permitting in-state lawyers to do so discriminates against interstate commerce. In particular, the Court should determine whether the California statute, as applied in *Birbrower* to out-of-state lawyers, can withstand the analysis applied to "local processing requirements" invalidated in the decisions discussed at page 16 of the Petition for Certiorari.

If the statute as interpreted by the California Court facially discriminates against out-of-state interests, it is "*per se* invalid, save in a narrow class of cases in which [the state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest."[11] No such demonstration has been made in this case.

Even, however, if this Court should determine that the California unauthorized practice statute as applied in the *Birbrower* decision "regulates evenhandedly with only 'incidental' effects on interstate commerce,"[12] it must still rule the statute unconstitutional if "the burden on such commerce is clearly excessive in relation to the putative local benefits."[13]

This would presumably require weighing the burden of a statute that if widely enforced against out-of-state attorneys

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10. Oregon Waste Systems v. Department of Environmental Quality, 511 U.S. 93, 99 (1994).

11. C & A Carbone v. Clarkstown, 511 U.S. 383, 392 (1994).

12. Oregon Waste Systems v. Department of Environmental Protection, *Id.* at n.9, and Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

13. Oregon Waste Systems v. Department of Environmental Protection, *Ibid*, and Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

would grind modern multi-state law practice to a halt, against the benefit of preserving the fiction that only members of the California State Bar are capable of serving California clients or of advising them on matters involving California law.

III. States Can Constitutionally Regulate Practice by Out-Of-State Lawyers if They Follow the Restatement Rule.

There is a way for states to enforce their unauthorized practice statutes as to out-of-state lawyers that is consistent with both the common practice of lawyers serving their clients and the Commerce Clause. That way is pointed to by the *Restatement of the Law Governing Lawyers*, recently adopted by the American Law Instititue. Section 3 of the *Restatement*, entitled "Jurisdictional Scope of Practice," states:

"A lawyer currently admitted to practice in a jurisdiction may provide legal services to clients in a matter:

"(1) at any place within the admitting jurisdiction;

"(2) before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with the requirements for temporary or regular admission to practice before that tribunal or agency; and

"(3) at a place within a jurisdiction in which the lawyer is not admitted to the extent the lawyer's activities in the matter arise out of or are otherwise reasonably related to the lawyer's practice under Subsection (1) or (2)."

While the Restatement has no force of law, it does represent the considered thinking of many impartial scholars and practicing lawyers as to the proper limits for states to place on interjurisdictional practice. The Comment to Section 3 recognizes "the need to provide effective and efficient legal services to persons and businesses with interstate legal concerns." This need, it says, "requires that jurisdictions not erect unnecessary barriers to interstate law practice." Petitioners would presumably meet the Restatement standard since they were originally

the considered thinking of many impartial scholars and practicing lawyers as to the proper limits for states to place on interjurisdictional practice. The Comment to Section 3 recognizes "the need to provide effective and efficient legal services to persons and businesses with interstate legal concerns." This need, it says, "requires that jurisdictions not erect unnecessary barriers to interstate law practice." Petitioners would presumably meet the Restatement standard since they were originally consulted about the representation in New York, where the retainer agreement was negotiated and signed,[14] and they spent more than 1,000 hours working on the case in their New York office,[15] making trips to California when required to serve their client's needs in the course of representation.

The Restatement Section and Comment were in proposed final draft at the time of the California Supreme Court's decision in *Birbrower*. The draft was adopted by the Institute on May 12, 1998, with an additional comment that stated in part: "Some decisions dealing with the right of an out-of-state lawyer to recover a fee from an in-state client seem unduly restrictive ...." The Comment cited *Birbrower* as such an unduly restrictive decision.

IV. This Court Should Review the Federal Constitutional Question or Remand to the California Court To Do So

This case cries out for a decision on constitutionality. As the Court is well aware, business today is multi-state and often global. Clients with multi-state business concerns expect their lawyers, who know their business, to represent them where and when requested. Those lawyers should not be left in the dark about whether California's super-restrictive construction of its

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14. Opinion of California Supreme Court, Appx. to Petition at page 3.

15. Petition for Certiorari, page 4.

the counsel it deems best able to furnish the advice and representation it needs because that counsel is unwilling to violate what California has declared to be its law, or does not wish to undergo the ordeal of a constitutional challenge.

The remarkable thing about the opinion of the California Supreme Court is that it construed the state unauthorized practice statute so as to impact interstate commerce without ever once mentioning the Commerce Clause of the Federal Constitution. This omission is even more remarkable in that the Petition for Certiorari states, at page 6: "During oral argument, the parties discussed at length the impact of the court of appeal's ruling on interstate commerce."

While the petition does not explain to what extent the Commerce Clause of the United States Constitution was discussed, there are "various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential ...."[16] This Court's jurisdiction "does not depend on citation to book and verse."[17]

If, though, the Court believes that the federal constitutional question was insufficiently drawn into question in the lower court, the more recent decisions of this Court have treated that requirement as prudential rather than jurisdictional.[18] Moreover, even if the requirement is jurisdictional, the Court may consider this important constitutional question if it concludes that the petitioner's alternative basis for seeking certiorari--whether the California unauthorized practice of law statute is preempted by

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16. New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

17. Eddings v. Oklahoma, 455 U.S. 104, 113 n.9 (1982).

18. Illinois v. Gates, 462 U.S. 213, 219 (1983).

question was insufficiently drawn into question in the lower court, the more recent decisions of this Court have treated that requirement as prudential rather than jurisdictional.[18] Moreover, even if the requirement is jurisdictional, the Court may consider this important constitutional question if it concludes that the petitioner's alternative basis for seeking certiorari--whether the California unauthorized practice of law statute is preempted by the Federal Arbitration Act--merits consideration. That question[19] was clearly presented to and ruled on by the California Supreme Court [20] and has drawn separate *amicus* comment in this Court.[21] Having granted certiorari to consider one federal question, this Court has in the past ultimately based its decision on a different federal question not urged in the lower court but apparent on the record.[22]

If the Court agrees with the FCBA that the applicability of the Commerce Clause is an important question, but believes it was insufficiently urged on the California Supreme Court, the accepted procedure would be to vacate the decision and remand the case to the state court for its consideration of the question. That was the course followed in *Vachon v. New Hampshire*,[23]

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18. Illinois v. Gates, 462 U.S. 213, 219 (1983).

19. Raised at pp. i and 29 of the Petition for Certiorari.

20. See Opinion of California Supreme Court at Appx. page 20.

21. See Brief *Amicus Curiae* of the Securities Industry Association.

22. Wood v. Georgia, 450 U.S. 261 (1981) (certiorari granted to consider equal protection claim based on inability to pay fines, but case remanded for consideration of a due process issue not raised in the lower court but apparent from the facts).

23. 414 U.S. 478 (1974).

That procedure would preserve what this Court has described as the importance "in a federal system ... that state courts be given the first opportunity to consider the applicability of state statutes in light of consitutional challenge, since the statutes may be construed in a way which saves their constitutionality."[27] It is indeed possible, if the California Supreme Court did not consider the applicability of the Federal Commerce Clause when it wrote its opinion, that such consideration might cause it to modify the surprising and highly restrictive interpretation that it placed on its state's unauthorized practice statute.

CONCLUSION

For the reasons stated, the Federal Communications Bar Association requests that the Court grant a writ of certiorari to review the decision of the Supreme Court of California and address and decide the constitutional issue in this case.

Respectfully submitted,

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25. Cardinale v. Louisiana, 394 U.S. 437, 439 (1969).